No. 84-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, *et al.*,
Appellants,

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of California

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BRIEF *AMICUS CURIAE* OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE* [1]

Vietnam Veterans of America ("VVA") is the largest national organization devoted exclusively to serving the interests and addressing the concerns of veterans who served in the United States military during the Vietnam era. VVA is a nonprofit veterans organization incorporated in New York in 1978 and exempt from federal income taxation pursuant to 26 U.S.C. §§ 501(a) & 501(c)(19) (1982). It has nearly 20,000 members, with

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[1] Pursuant to Rule 36 of the Supreme Court Rules, written consent to file this brief has been obtained from counsel of record for all parties. The letters of consent have been filed with the Clerk of the Court.

165 chapters located in 38 states, the District of Columbia, and Puerto Rico. Membership is restricted to those who served on active duty during the Vietnam era (August 5, 1964 to May 7, 1975).

VVA was created to foster and promote improvement in the economic, social, physical and educational welfare of Vietnam veterans. As one means of furthering this goal, in 1981 VVA applied for and received recognition by the Veterans Administration ("VA") to represent claimants for benefits before that agency.[2]

Before forming its program for representing veterans before the VA, VVA reviewed the service programs used by the other veterans service organizations recognized by the VA. VVA found that these organizations have chosen to rely primarily upon individuals who are neither lawyers nor trained by lawyers to provide claims assistance. For reasons discussed below, VVA rejected this model. VVA instead developed a program in which all veterans are represented before the Board of Veterans Appeals ("BVA") by a lawyer or a law student supervised at all stages by a lawyer.[3]

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[2] This recognition was granted pursuant to 38 C.F.R. § 14.628(c) (1984). In order for an organization to receive this recognition, the VA must determine that the organizational applicant is "primarily involved in delivering services connected with either title 38, United States Code benefits and programs or other Federal and State programs designed to assist veterans." *Id.* Contrary to the assertion of *amicus curiae* Disabled American Veterans ("DAV"), DAV Br. at 22, VA regulations do *not* require organizations recognized by the VA to represent all veterans who request representation. *See* 38 C.F.R. § 14.628(d)(4). Nonetheless, VVA attempts to provide representation to all those who request it.

[3] Because VVA has been unable to find enough attorneys willing to represent veterans at the lower levels of the agency, i.e., at the VA regional office level, VVA has had to rely on many individuals without formal legal training ("service representatives") to represent claimants at the regional office level. Although VVA would prefer to provide lawyer representation at all levels of the agency, VVA believes it is appropriate, given its limited resources, to provide lawyers before the BVA because the BVA provides *de novo* review of a veteran's claim and is the final level of review within the agency.

To implement its program of lawyer representation, VVA entered into a contract with a law school clinical program which uses salaried attorneys and law students to represent claimants without charging the veteran a fee. VVA has also organized a panel of volunteer attorneys willing to represent veterans on an *ad hoc* basis without charge. In addition, VVA hired its own staff attorneys to monitor its service program and supplement the legal services provided by the law school clinical program and volunteer attorneys. In October 1983, VVA's salaried staff attorneys published a 640-page "Service Representatives Manual," supplemented by a bi-monthly veterans law newsletter, as a guide to all of VVA's accredited representatives providing legal services before all levels of the VA and other federal agencies involved in veterans law. VVA's legal staff also trains VVA's service representatives in legal advocacy skills and in the various substantive areas of veterans law.

VVA chose to emphasize lawyer representatation for a combination of reasons, including (1) the special skills and knowledge generally possessed by individuals with formal legal training and experience as practicing lawyers; (2) the inherently legal nature of the benefit programs administered by the VA and the VA adjudicatory system itself; (3) the often complex interrelationship between VA benefits claims and other substantive areas of veterans law; and (4) the involvement of VVA's legal staff in pursuing VVA's national policies to promote the interests and enhance the rights of Vietnam veterans. VVA believes that its decision to provide lawyer representation before the BVA has benefited the veterans VVA has served. And because VVA believes that veterans who do not have access to free legal representation, or who for their own reasons choose not to be represented by a serv-

ice organization, should be able to hire counsel of their choice, VVA strongly supports appellees in seeking to overturn the fee limitation contained in 38 U.S.C. § 3404(c) (1982).

VVA is also participating in this proceeding because it believes that the Court should be aware that the fee limitation has inhibited the development of a private bar with expertise in veterans law. VA benefits adjudication is only one of several interrelated areas which together form the field of veterans law. Veterans' legal rights are also affected by the laws governing discharge upgrading, correction of military records, and service department physical disability retirement compensation, among others. As in other fields, special training and experience are required to develop an expertise in the various interrelated areas of veterans law. It is VVA's perception that, owing in large measure to the fee limitation, members of the private bar have been discouraged from developing an expertise in veterans law. Thus, not only are veterans precluded from hiring attorneys to represent them before the VA, but they also experience more difficulty in obtaining qualified legal representation in cases that fall outside the VA than they would if a free market for legal services prevailed. VVA believes that the elimination of the fee restriction will benefit all veterans by fostering the growth of a private bar with the skills and experience to provide specialized legal assistance to veterans.

SUMMARY OF ARGUMENT

The procedural due process issue presented in this case differs from that of the typical due process challenge in that appellees do not seek the creation of new procedural rights. All that appellees seek in challenging the fee limitation is that the right to representation by counsel before the VA, which is already established by statute and recognized in the VA's regulations, be made meaningful by allowing veterans to hire counsel of their own choice. Fundamental fairness requires elimination of the fee limi-

tation because a veteran's interest in hiring counsel of his choice far outweighs the government's interest in retaining the fee limitation.

Although the VA adjudication process does not involve trial-type procedures, it is a highly complex legal process that determines matters of vital importance to veterans. The VA itself relies heavily on the skills of its lawyers, particularly at the BVA level, and VVA's experience in representing veterans before the VA confirms that numerous aspects of the VA adjudication process call for the exercise of lawyers' skills on behalf of veterans. Lawyers can play a critical role in advising veterans on such threshold strategic decisions as whether their claims should be brought before the VA in the first instance or whether resort to other fora is necessary to establish conditions of eligibility for VA benefits. Lawyers can assist veterans in marshalling and presenting the complex factual and medical evidence that must be established in order to obtain VA benefits. Trained legal analysis is frequently critical in mastering the substantive legal concepts that arise in the course of VA adjudication. Finally, lawyers are particularly well suited to brief the issues that are dispositive of veterans' claims and to represent veterans in hearings before the BVA.

In contrast to veterans' substantial interest in being free to hire counsel of their choice, the government's asserted interests in retaining the fee limitation are mere rationalizations that are unsupported by the record in this case. Moreover, the government's reliance on Congress' failure to abolish the fee limitation is irrelevant to the constitutional issue. Even if Congress had unqualifiedly endorsed the fee limitation, which is far from the case, it remains the responsibility of the courts, not Congress, to determine the constitutionality of the fee limitation statute.

In addition to violating veterans' due process rights, the fee limitation is manifestly at odds with the First

Amendment. Not only does it infringe upon the First Amendment rights of the organizational appellees, as the district court found, but it infringes upon the First Amendment rights of individual veterans in two ways. First, the fee limitation effectively prevents veterans from hiring lawyers to speak on their behalf before the VA and thereby directly restrains the speech that is uttered on a veteran's behalf. Second, by preventing veterans from hiring lawyers to represent them before the VA, the fee limitation inhibits veterans from consulting with lawyers on other legal matters related to their status as veterans, thereby foreclosing them from access to information necessary to conduct their legal affairs in a knowledgeable and responsible manner.

ARGUMENT

I. THE FEE LIMITATION DENIES VETERANS PROCEDURAL DUE PROCESS BY FORECLOSING ACCESS TO COUNSEL OF THEIR CHOICE IN VA CLAIMS PROCEEDINGS

The government's analysis of the due process issue in this case is inherently defective because the government approaches the issue as if appellees were seeking to create a wholly new procedural right—the right to be represented by counsel in claims proceedings before the VA. In fact, the very circumstance that distinguishes this case from most other due process actions is that appellees do not request the institution of new or incremental procedural protections at additional cost to the government. Appellees do not seek additional opportunities to be heard, *cf. Goldberg v. Kelly*, 397 U.S. 254 (1970); they do not seek to convert the VA claims adjudication process into trial-type proceedings, *cf. Mathews v. Eldridge*, 424 U.S. 319 (1976); nor do they seek to have counsel provided for them at the government's expense, *cf. Gideon v. Wainwright*, 372 U.S. 335 (1963). Indeed, appellees do not even seek the right to be represented by counsel before the VA. That right is already provided by statute:

> The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

38 U.S.C. § 3404(a) (1982). This right to representation by a lawyer is confirmed in regulations promulgated by the VA.[4]

All that appellees seek in this case is that the already established right to representation by an attorney before the VA be made meaningful by permitting veterans to hire counsel of their own choice. The existing scheme is constitutionally deficient because it confers the right to legal representation but, through the fee limitation, restricts the exercise of that right to veterans who are fortunate enough to obtain free legal services. Thus many veterans are unable to be represented by attorneys before the VA, even though they wish to be and are willing to pay for such representation.[5]

The recognition that this case involves only a request that veterans be given a meaningful opportunity to avail themselves of existing procedures—not a request that new or expanded procedures be provided—underscores the frailty of the government's arguments in support of the fee limitation. For example, the contention that the "informal and nonadversarial" nature of the VA claims system somehow insulates the fee limitation from due process challenge is at odds with the fact that Congress explicitly authorized the participation of attorneys in VA claims proceedings. Clearly the procedural protection that

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[4] *See* 38 C.F.R. § 3.103(d) (1984) ("[C]laimant is entitled to representation of his choice at every stage in the prosecution of a claim."); 38 C.F.R. § 19.150 (1984) (appellant before the BVA "will be accorded full right to representation in all stages of an appeal by a recognized organization, attorney or agent").

[5] The government does not dispute the district court's finding that "the $10.00 fee limitation essentially eliminates veterans' right to obtain private counsel of their own choosing to represent them in bringing service-connected death and disability claims before the VA." J.S. App. 22a.

appellees seek here—access to representation by counsel of their choice—cannot be antithetical to a VA adjudication process that by statute and regulation contemplates the participation of counsel.

In VVA's view, the determination of whether the VA claims process is "adversarial" or "nonadversarial" is not a necessary step in resolving the issue of the constitutionality of the fee limitation. From the perspective of the veteran who is determining how to pursue his claim for benefits before the VA, the issue is not how closely VA proceedings resemble trial-type proceedings; the issue is whether the veteran reasonably believes that, because his claim is sufficiently critical to his well being or difficult to prove or complex, it is in his best interest to be represented by a lawyer of his choice. VVA's own experience of the VA claims process has demonstrated that there are numerous aspects of that process that would justify a veterans' belief that he should retain a lawyer, whether or not the process is nonadversarial in nature. *See infra* Part I.A.

For similar reasons, VVA believes that the availability of free assistance before the VA by various service organizations does not compensate for the constitutional infirmity of the fee limitation. Congress did not establish service organization representation as the exclusive form of representation before the VA, and there is no other basis for inferring that the availability of free representation should preclude a veteran from retaining counsel of his choice. Moreover, in VVA's view, there is no basis for assuming, as the government and DAV seem to do, that the right to counsel could only be triggered by a determination that service organizations' representatives are inadequate. VVA believes that the availability of free service organization representation is beneficial to veterans as a class.[6] Assuming the general competence of

[6] VVA also wishes to make clear that its participation in this case on behalf of appellees is not intended to "raise an inference about the adequacy of DAV's" NSO representation system. *See* DAV Br. at 15.

service representatives, it is nevertheless the case that many veterans rationally prefer to retain the services of a lawyer. VVA itself has chosen to require legal training and lawyer supervision of all who appear before the BVA on its behalf because it believes that such training and supervision is advantageous to veterans. Similarly, many veterans might choose to retain counsel because they believe that this would best serve their individual interests. The fee limitation precludes them from making that choice.

Procedural due process is, as the government acknowledges, a guarantee of fundamental fairness. *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). The determination of what constitutes fundamental fairness will, of course, vary from case to case because "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). In this case, where Congress and the VA itself have expressly contemplated that veterans can be represented by lawyers in pursuing their claims before the VA, fundamental fairness requires that they be allowed to retain lawyers of their own choice, at no cost to the government. Veterans' private interests in being able to secure the assistance of counsel in pursuing claims before the VA far outweighs the government's asserted interests in retaining the fee limitation.

A. Veterans Have a Compelling Interest in Being Represented by Counsel of Their Choice in VA Claims Adjudication

Veterans and their dependents have an undisputed vital stake in recovering service-connected death and disability benefits from the VA. The district court found that

> [t]he veterans' interest in obtaining service-connected death and disability benefits is extremely high. Their need for such benefits is great and compensation through the VA claims procedure is the veterans'

> sole remedy against the government. They cannot sue for disabilities stemming from their military service under the Federal Tort Claims Act. *Feres v. United States*, 340 U.S. 135 (1950).

J.S. App. 20a. Moreover, since there is no judicial review of VA claims determinations, 38 U.S.C. § 211(a), the VA's resolution of any given claim is dispositive. If the veteran does not prevail before the VA, he will not obtain or keep the benefits administered by the agency that may be essential to his well being or very survival.[7]

The interest of veterans in retaining counsel to pursue VA benefits stems from the nature of the VA claims adjudication process itself. The district court analyzed that process in considerable detail and concluded that "[t]he undisputed factual evidence submitted by the plaintiffs in this case shows that both the procedures and the substance entailed in presenting SCDD claims to the VA are extremely complex." J.S. App. 30a. VVA's own experience in representing veterans before the VA emphatically con-

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[7] The government does not deny that veterans have a vital stake in the outcome of VA benefit claims proceedings. Similarly, the government indicates that it does not press the argument that applicants for VA service-connected death and disability benefits do not have a property interest that is protected by the Due Process Clause. Appellants' Br. at 46 n.49. The government suggests that the Court need not reach that issue in this case. *Id.*

If, however, the Court does reach the question, VVA strongly urges the Court to find that applicants for service-connected death and disability benefits *do* have a protected property interest in those benefits. Such benefits, like the welfare benefits in *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), "are a matter of statutory entitlement for persons qualified to receive them." There is no principled distinction between the situation of the claimants in *Goldberg* who faced termination of their benefits because their qualifications for such benefits had been called into question and the situation of veterans who resort to the VA in order to establish their qualifications for benefits. In both cases, the right to benefits is established by statute and the administrative proceeding is the vehicle for determining whether the statutory criteria are satisfied. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

firms that the VA adjudicative process is every bit as complex as the district court found it to be. Moreover, VVA has found that many of the complexities presented by the VA adjudicative process are precisely the sort that call for the exercise of legal judgment and skills.

The government's suggestion that the nonadversarial nature of the VA adjudicative process renders lawyers unnecessary is myopic.[8] While the VA adjudicative process may be nonadversarial in contrast to trial-type proceedings, it is nevertheless in its very essence a legal process. And the VA itself assigns a fundamental and central role to attorneys in that process. The VA has hundreds of lawyers who are intimately involved in every aspect of veterans claims adjudication. At least one member of each of the three-person rating boards that decide claims at the regional office level is a legal specialist, usually an attorney.[9] Other attorneys are involved at the regional office level in reviewing disputed initial decisions and preparing statements of the case in those instances where veterans disagree with the action of the regional office.

The participation of VA attorneys is even more intensive at the appeals level. The BVA consists of 16 three-member panels; fifteen of those panels include two lawyers and the sixteenth is comprised entirely of lawyers.[10]

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[8] The government's erroneous view of the process may stem from its inexplicable refusal to consider the factual record that formed the basis for the district court's conclusions. *See* Appellants' Br. at 35 n.35.

[9] Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1004 (1977).

[10] *See* I Legal Services Corp., Special Legal Problems and Problems of Access to Legal Services of Veterans, Native Americans, A Report to Congress as Required by § 1007(h) of the Legal Services Corp. Act of 1974, as amended A-4 (1980) [hereinafter cited as Legal Services Corp. Report].

Moreover, as of 1983, the work of the BVA was supported by a staff of 117 attorney advisors.[11] Finally, the BVA is, by statute, bound by the precedent opinions of the VA's General Counsel. 38 U.S.C. § 4004(c) (1982).

The extent to which legal training and skills are essential to the daily operation of the VA claims process is evidenced by the VA's own dependence on attorneys and by the duties assigned those attorneys. The following excerpts from VA descriptions of the "principal duties and responsibilities" for the jobs of attorney advisor to the BVA, at the GS-11, GS-13 and GS-14 levels respectively, are illustrative: [12]

GS-11

A. Reviews and evaluates the evidence in claims folders and prepares tentative appellate decisions in written form for consideration of the Board Section. In connection therewith, applies the laws administered by the VA to the facts in the individual cases. Cases are assigned on a selective basis to progressively gain experience in the various kinds of appellate issues.

GS-13

A. Reviews and evaluates the evidence in claims folders. Applies the laws administered by the Veterans Administration to the facts in the individual case; then, prepares appellate decisions in written form for consideration of a Board Section. Very difficult cases, involving questions of law and fact, are selected for assignment to incumbent. Examples: Cases in which there are multiple questions at issue; new or novel questions for which there are no precedents; claims for entitlement to several benefits; claims for entitlement under a number of different provisions of law; cases involving highly conflicting evidentiary data which must be reconciled; contesting claims from several claim-

[11] 1983 VA Ann. Rep. 115.

[12] The descriptions are reprinted in full in the Appendix to this brief at 1a to 5a.

ants for the same benefit; and cases vigorously argued by representatives.

B. Conducts research on original and novel questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. Gives advisory opinions orally or in writing on very difficult, complex and controversial problems encountered in appellate review.

D. When so requested by the Chief Member, attends hearings on appeals conducted before the Board in particularly involved cases, for the purpose of assisting the Section members in examining witnesses so as to assure that all relevant evidence is elicited.

GS-14

D. Prepares decisions requiring a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems submitted to the Board for final resolution. Obtains and evaluates expert opinions from the Chief Medical Director and independent medical experts associated with leading medical schools.

VVA submits that a legal process which, *inter alia*, requires the VA's own lawyers to exercise "a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems" is precisely the sort of process in which at least some veterans might require legal representation, whether or not the process is nonadversarial in nature. The range of skills exercised by attorneys is by no means limited to those that are exercised in purely adversarial proceedings. As this Court recognized in *Goldberg v. Kelly*, 397 U.S. at 270, "[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." Only one of these skills, the conduct of cross-examination, is limited to the adversarial context. All of the other attributes of skilled

counsel recognized by the Court—and several not specifically enumerated—are called upon in the VA claims adjudication process.

1. *Lawyers Can Assist Veterans in Making Crucial Strategic Decisions*

Whether or not they are involved in adversarial proceedings, lawyers are regularly called upon to advise their clients in making strategic decisions that affect their clients' rights. In VVA's experience, there are many situations in which veterans pursuing claims before the VA could benefit substantially from receiving informed strategic advice of the type that lawyers have the training and experience to give.

This advice may encompass such fundamental questions as whether the starting point in obtaining VA benefits is to bring a claim before the VA itself, or whether preliminary steps should be taken before other fora prior to the initiation of a VA claim. The facts underlying the decision in *Yagjian v. Marsh*, 571 F. Supp. 698 (D.N.H. 1983) are illustrative. There, plaintiff, a World War II veteran with a rare form of cancer, sought service-connected disability benefits from the VA. His claim was denied by the VA regional office and the BVA on the grounds that his disease was not service connected. Specifically, the BVA found that there was no indication of the disease in plaintiff's military records, although it acknowledged that the records were incomplete and could not adequately be reconstructed. Plaintiff then filed an application for correction of his military records with the Army Board for Correction of Military Records, an agency wholly unrelated to the VA, created by Congress pursuant to 10 U.S.C. § 1552 (1982).[13] Although his application was initially rejected by that agency, the

[13] Because the $10 fee limitation applies only to VA proceedings, Correction Board applicants are free to hire counsel of their choice. Moreover, Correction Board decisions are subject to judicial review. *Chappell v. Wallace*, 103 S. Ct. 2362, 2367 (1983).

district court on review reversed and ordered correction. Plaintiff was then in possession of sufficient evidence to establish service connection and could proceed to recover benefits from the VA. Clearly, the plaintiff in *Yagjian*, and the VA itself for that matter, would have been better served if he had been counseled by a lawyer with an overview of veterans law who could have advised him that his application to the VA would likely be futile unless he succeeded in correcting his military records.

Similar kinds of threshold strategic decisions can arise in the case of veterans who have been discharged from military service under other than honorable conditions. To become eligible for VA disability compensation, such veterans must either resort to fora outside the VA to upgrade the character of their discharge, or persuade the VA that the discharge should be deemed to have been granted under conditions other than dishonorable for the purpose of determining eligibility for VA benefits.[14] The non-VA fora with authority to issue a discharge upgrading determination binding on the VA include both military agencies created by Congress and the federal courts.[15] Veterans are permitted to hire lawyers to pursue their discharge upgrade claims before all these non-

[14] 38 C.F.R. § 3.12 (1984) defines the relationship between the character of discharge certificate issued by a military department and eligibility for VA benefits. Subject to certain narrowly defined exceptions, upgrades to an Honorable or General Discharge legally bind the VA to determine that the veteran is eligible for benefits.

[15] Discharge upgrading determinations can be issued by a Board for Correction of Military Records established pursuant to 10 U.S.C. § 1552 and Discharge Review Boards established pursuant to 10 U.S.C. § 1553. *See* 38 C.F.R. § 3.12 (1984). Decisions by these agencies denying applications to upgrade discharges are subject to judicial review. *See Harmon v. Brucker*, 355 U.S. 579 (1958). Veterans have also resorted directly to federal court in an effort to obtain upgrading of military discharge. *See Walters v. Secretary of Defense*, 725 F.2d 107 (D.C. Cir. 1983).

VA fora. The role of counsel in determining which fora to resort to and in what sequence can be critical:

> The complex interrelationship between the Discharge Review Boards, the Boards for Correction of Military Records and the VA serves to demonstrate the need for trained legal advocates. Depending upon the conduct involved, individual cases may start in any of the agencies and go to two or all for ultimate resolution. The choice of the proper forum is critical to maximizing [the] chance of success.[16]

2. *Lawyers Can Assure that Information Is Developed in a Manner that Will Maximize the Veteran's Chance of Prevailing on His Claim*

The ability to develop and organize complex factual information is a skill that is required of and acquired by virtually every competent lawyer, regardless of the nature of his practice. VVA has found that information development is of critical importance in pursuing claims before the VA.

The most fundamental form of information development required in VA adjudications is marshalling the factual and medical evidence that will establish a service-connected death or disability. Generally, essential portions of this evidence are contained in the veteran's military service records, which the VA routinely obtains in processing a benefits claim, but often the service records themselves are incomplete, or the medical information contained in them is insufficient to establish the claim. *See Yagjian v. Marsh*, 571 F. Supp. at 700 (some of veteran's service records apparently destroyed by fire at official records repository; extant records did not document his disease). In such cases, the veteran must develop the evidence from other sources such as affidavits of personnel who treated or knew of his medical condi-

[16] Legal Services Corp. Report, *supra* note 10, at 69 n.34.

tion while he was in the service, as well as the testimony of physicians who are currently treating him for his disability. In other cases, it may be necessary for a veteran to obtain military records other than his own service records in order to establish his claim. For example, in Post Traumatic Stress Disorder cases, where it is necessary to establish the traumatic service-related event that precipitated the veteran's psychological disability, VVA has found it advantageous to resort to the Freedom of Information Act to obtain military operational reports, casualty reports, letters to next of kin and the like in order to document the traumatic occurrence.

The development and presentation of medical evidence in VA claims frequently requires the use of medical experts. As the VA's own requirements for lawyer involvement demonstrate, lawyers have the training and experience required to develop a record based on expert testimony. A veteran's attorney could both help the veteran locate the medical experts who can be of greatest assistance in supporting his case and help draft the written testimony or present the oral testimony of the expert medical witness in the most cogent and persuasive manner.

3. *Veterans Need the Assistance of Lawyers in Resolving the Substantive Legal Issues that Frequently Arise in VA Proceedings*

A veteran's right to recover service-connected death and disability benefits from the VA is governed by a complex set of substantive statutory provisions and regulations that are the subject of ongoing interpretation in both informal and binding opinions by the VA's General Counsel. Legal analysis is frequently required to determine how a particular substantive legal standard applies to the facts of an individual veteran's case. For example, a veteran is precluded from recovering benefits if his service-connected disability arose as a result of his own willful misconduct. 38 U.S.C. § 331 (1982). The definition

of "willful misconduct" set forth in the VA's regulations and the operation of the concept is legalistic and complex:

> "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.
>
> (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.
>
> (2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.
>
> (3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.

38 C.F.R. § 3.1(n) (1984). The concept thus incorporates elements of intent analogous to the intent component needed to establish guilt under our system of criminal law and also incorporates such other inherently legal notions as "proximate causation." The need for trained legal assistance to rebut a suggestion of willful misconduct is manifest.

A similarly complex substantive legal issue arises from the VA regulations governing character of discharge from military service. Generally, a veteran's discharge must be under conditions "other than dishonorable" in order for him to be entitled to benefits. *See* 38 U.S.C. § 101(2) (1982). A veteran separated from the service under other than honorable conditions issued as a result of an absence without leave ("AWOL") for a continuous period of at least 180 days is disqualified from entitlement for benefits unless the VA determines that there are compelling circumstances to warrant the AWOL. *See* 38

C.F.R. § 3.12(c)(6) (1984). One of the factors that VA regulations require to be considered in determining whether there are such compelling circumstances is if "[a] valid legal defense exists for the absence which would have precluded a conviction for AWOL." 38 C.F.R. § 3.12(c)(6)(iii) (1984). A veteran would be extremely hard pressed to make this showing of compelling circumstances without mastering principles of substantive military law.

Other instances of the legal concepts that permeate VA regulations and its adjudication process are too numerous to set forth in detail. The regulations establish a complex burden of proof standard which requires the claimant "to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded." 38 C.F.R. § 3.102 (1984). The regulations also contain provisions governing the introduction and operation of "new and material evidence." 38 C.F.R. § 3.156 (1984). In addition to the statutes and rules, the VA General Counsel issues a steady stream of opinions, both informal and binding, that shape the contours of substantive VA law. These decisions regularly address such complex legal issues as the retroactive determination of effective dates for establishing eligibility for VA benefits, the effect of decisions of the military service Discharge Review Boards and Boards for Correction of Military Records upon substantive VA benefit standards, the interrelationship between the different—and sometimes conflicting—statutory provisions governing eligibility for VA benefits, and the effect of state law provisions in determining eligibility for certain VA benefits. To comprehend fully the vast majority of these General Counsel opinions and to apply the rules of law they establish to the facts of an individual veteran's claim is a lawyer's task.[17]

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[17] The assistance of lawyers is required not only to master the complex legal standards involved in VA claims proceedings; it is also critical in mounting challenges to the legality of certain of those standards. Veterans who have been able to obtain free legal

4. *The Assistance of Lawyers Is Often Required in Order to Produce Effective Briefs and in Order to Guarantee Effective Oral Advocacy*

Whether or not the VA adjudication process is non-adversarial, VVA has found that the skills of legal advocacy are often critical in resolving a claim in the veteran's favor. These skills are particularly essential at the BVA level where veterans' claims are heard *de novo* and where two of three members of the typical BVA panel are lawyers. In VVA's experience, effective advocacy before the BVA entails the careful preparation of briefs setting forth the facts of the veteran's case and discussing the applicability of the substantive law, including any relevant VA General Counsel opinions, to those facts.[18] The preparation of such briefs is, of course, a task for which lawyers are particularly trained.[19]

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representation have succeeded in persuading federal courts that various of the standards applied by the VA as a bar to the recovery of benefits are unlawful. *See, e.g., McKelvey v. Walters*, 596 F. Supp. 1317 (D.D.C. 1984) (holding that 38 C.F.R. § 3.301(c)(2), which requires denial of benefits in all cases involving primary alcoholism, violates § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794); *Tinch v. Walters*, 573 F. Supp. 346 (E.D. Tenn. 1983) (same), *appeals docketed*, Nos. 83-5926 & 83-5955 (6th Cir., filed Dec. 12, 1983); *Peed v. Cleland*, 516 F. Supp. 469 (D. Md. 1981) (holding that VA regulations requiring that military retirement benefits be considered as income in computing eligibility for VA pension violates congressional intent).

[18] The Veterans Administration has also recognized that "attorneys because of their analytical skills and abilities to argue persuasively from a carefully prepared evidentiary record are peculiarly able to represent a claimant in a forceful, professional and effective manner especially at the BVA and court levels." S. Rep. No. 178, 96th Cong., 1st Sess. 103 (1979).

[19] The District Court found that "it is standard practice for service organization representatives to submit merely a one to two page handwritten brief. This brief rarely cites to authority, and in fact is frequently written by the claimant himself rather than by the representative." J.S. App. at 36a-37a (citations omitted).

In addition to providing effective written support for a veteran's claim at the BVA level, VVA has found that lawyers are particularly likely to request an oral hearing before the BVA. As the district court noted, the VA's own statistics show that where a personal hearing was held before the BVA, the claimant was twice as likely to succeed. J.S. App. at 35a.[20] Such oral hearings are normally sought in cases handled by VVA lawyers and provide a critical opportunity to bring into focus the factual and legal contentions that warrant a grant of the veteran's claim.[21] An attorney can guarantee that these opportunities to be heard are, in fact, meaningful ones. *See Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *Goldberg v. Kelly*, 397 U.S. at 270.

B. The Government's Claimed Interest in Retaining the Fee Limitation Is Insubstantial

The government contends that the fee limitation withstands constitutional challenge because Congress has considered abolishing the fee limitation but has not done so. *See* Appellants' Br. at 33-43. The government also suggests that there are several "legitimate purposes" of the fee limitation that justify its retention. *See id.* at 30-32. In VVA's view, neither of these arguments has any merit.

The failure of Congress to amend the fee limitation statute does not dispose of the question of whether this

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[20] The Senate Committee on Veterans' Affairs also noted that the VA's statistics "are very suggestive that a personal appearance before the Board makes a significant difference in achieving favorable resolution of a claim." S. Rep. No. 178, 96th Cong., 1st Sess. 33 (1979).

[21] Contrary to the government's assertion that "questions of credibility and demeanor do not play a significant role" in service-connected disability claims, VVA has found that the BVA attaches considerable weight to a veteran's credibility and demeanor. *See* 38 C.F.R. § 19.165 (1984) (requiring swearing of witnesses). Moreover, trained counsel can advise the veteran so as to assure the effective presentation of his testimony.

statute as enacted and as applied is constitutional, nor is this failure a reliable indicator that Congress found the existing system to be fair and constitutional. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 265 (1945). On the contrary, the fact that the Senate, in each of the last three sessions, passed legislation to permit hired attorneys before the VA in some circumstances indicates substantial congressional dissatisfaction with the fee limitation.[22]

Even if Congress had expressed its belief in the constitutionality of the fee limitation, "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." *Powell v. McCormack*, 395 U.S. 486, 549 (1969). That Congress may have a different view regarding the constitutionality of a given statute "cannot justify the courts' avoiding their constitutional responsibility." *Id.* (footnote and citations omitted). Thus, the Court must examine the reasons advanced by appellants in support of the fee limitation statute.

The government's asserted reasons for retaining the fee limitation are mere rationalizations that are far outweighed by veterans' interest in hiring counsel of their choice. For example, the government suggests that the fee limitation should be retained because it assures that benefits recovered from the VA will be available solely

[22] The Senate Report principally relied on by the government did not endorse the complete exclusion of hired attorneys from the VA process. It found that the existing statutory limitation "is an undue hindrance on the rights of veterans . . . to select representatives of their own choosing" and reported out a bill allowing a veteran to choose to hire an attorney after the BVA initially denies a claim for benefits. S. Rep. No. 466, 97th Cong., 2d Sess. 50 (1982). The availability of an attorney at this juncture is significant; as the government observes, "[a]lthough the decision of the BVA is final, liberal provisions exist for reconsidering a BVA decision and for reopening a denied claim on the basis of new evidence." Appellants' Br. at 8 n.8.

for veterans' use and not diminished by lawyers' fees. Appellants' Br. at 31. The fallacy of this justification is that it assumes the recovery of benefits by the veteran. But it is the very difficulty of recovering benefits that warrants the decision by a veteran that his interests would be best served by retaining a lawyer. The veteran who pays his lawyer a portion of any recovered benefits is manifestly better off than the veteran who does not recover benefits at all. Veterans, like other purchasers of legal services, should be left free to make decisions concerning their own economic self-interest.

The government further claims that the fee limitation protects veterans from unscrupulous attorneys. *Id.* at 32. That rationale is outmoded and, VVA believes, an affront to the intelligence and judgment of veterans. Existing disciplinary rules and state laws are clearly adequate to protect veterans from unethical or unlawful conduct on the part of attorneys.[23] More fundamentally, there is no rational basis for singling out veterans as the sole class of recipients of federal benefits who are presumed to be incapable of recognizing their own interests and who require special protection from lawyers.

Finally, the government argues that the retention of the fee limitation is necessary in order to preserve the nonadversarial nature of the VA adjudication system. *Id.* at 30. The notion that abolition of the fee limitation would alter the nature of the VA system is mere uninformed speculation. In fact, lawyers already represent veterans before the VA and there is no evidence in the

[23] The Senate Report relied upon by the government also rejects the claim that the fee limitation is necessary to protect veterans from unscrupulous lawyers. "Whatever the merits of such a view at the time that the limitation was imposed, . . . it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable." S. Rep. No. 466, 97th Cong., 2d Sess. 50 (1982) (citations omitted).

record to indicate that their presence has impeded the system from working in a nonadversarial manner. Other benefit programs, notably the social security system, are nonadversarial in many of the same ways as the VA system; yet the social security system has accommodated the presence of paid attorneys for years.[24]

The Disabled American Veterans have also asserted an interest in retaining the fee limitation. DAV suggests that some veterans perceive a special "psychological value" in being represented before the VA by DAV service representatives who share similar "personal conditions" as the claimants. DAV Br. at 13-14. DAV further suggests that the invalidation of the fee limitation would imperil this psychological value and undermine DAV's representation program. *Id.* at 26-27. DAV's concern is misplaced. Striking down the fee limitation will in no way deter veterans who perceive a psychological value in being represented by DAV's personnel from

[24] The cases relied upon by the government for the proposition that the presence of counsel will transform the nature of the proceeding are wholly inapposite to the VA adjudicatory process. *See* Appellants' Br. at 30. *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Baxter v. Palmigiano*, 425 U.S. 308 (1976), involved the question of whether a due process right to counsel exists in prison disciplinary proceedings. The Court's determination that granting access to counsel in this context could severely disrupt correctional goals, 418 U.S. at 570, has no relevance to proceedings before the VA. The summary court-martial proceedings at issue in *Middendorf v. Henry*, 425 U.S. 25 (1976), are similarly inapplicable to the VA context. There Congress provided alternative procedures that an accused service member could invoke in defending against criminal charges. The Court's decision to preserve the summary character of one set of procedures by denying the right to appointed counsel at the government's expense when this right could be invoked in full-scale court-martial proceedings has no bearing on the VA adjudication process, which is neither a summary sort of proceeding nor an alternative to a more elaborate proceeding where the right to counsel is guaranteed. Finally, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court merely denied an automatic right to state-appointed counsel in revocation of probation cases.

continuing to use such representation.[25] What invalidation of the fee limitation will do is give other veterans an opportunity to pursue their own perceived psychological values by being represented by counsel of their choice.[26]

II. THE FEE LIMITATION INFRINGES ON VETERANS' FIRST AMENDMENT RIGHTS OF SPEECH AND ASSOCIATION AND THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

A. The Fee Limitation Violates the First Amendment by Denying Veterans the Advocates of Their Choice

The right of a veteran to recover service-connected death and disability benefits from the VA is contingent upon his ability or that of his representative to establish his claim before the agency. A veteran must "submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded." 38 C.F.R. § 3.102 (1984). The process as a whole involves an effort on the veteran's behalf to petition the government for redress of his grievances and its principal components are various forms of written and oral speech.

The fee limitation inhibits the veteran's efforts to petition the VA and restrains the speech uttered on his behalf because it effectively precludes the veteran who wishes to hire a lawyer from communicating with the VA through the advocate of his choice. While the veteran

[25] As to the allegation of harm to the service organizations as a result of elimination of the fee limitation, DAV is unable to posit any manifestations of harm other than to suggest that enterprising lawyers might hire some of DAV's service representatives as paralegals. *Id.* at 26. Even if this unfounded speculation proved accurate, VVA is unable to understand why DAV should be protected from such changes in personnel which are commonplace in our nation's economy.

[26] It is certainly reasonable to believe that just as some veterans perceive a psychological value in being represented by disabled veterans, others perceive a distinct benefit in being represented by counsel whom they have personally selected. *See* Carrington, *The Right to Zealous Counsel*, 1979 Duke L.J. 1291 (1979).

is not prevented from petitioning or speaking altogether, he is prevented from engaging in the particular mode of petitioning and speaking that will most effectively present his case. By prohibiting paid legal advocacy, the fee limitation amounts to censorship of a powerful and effective mode of speech.

This Court has recognized that the effectiveness of certain kinds of speech is a function of the resources that can be devoted to that speech. For example, arbitrary restrictions on the amount of money that a person can spend on political speech

> represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," . . . would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.

Buckley v. Valeo, 424 U.S. 1, 19-20 (1976) (footnotes and citation omitted). Similarly, in this case, the fee limitation constitutes a substantial restraint on the kind of advocacy in which the veteran can engage, thereby undermining the effectiveness of the veteran's efforts to obtain VA benefits. Allowing veterans to hire lawyers subject to the $10 fee limitation "is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 18 n.19.

This Court's decision in *Buckley v. Valeo* is particularly apposite because the positions that hired lawyers would advocate on a veteran's behalf before the VA have overtones of political speech. VVA's experience indicates that the situations in which lawyer representation before the VA is especially critical include claims for disabilities arising from exposure to toxic chemicals and atomic radiation and Post Traumatic Stress Disorder claims. Although the veterans bringing these claims are seeking benefits in order to improve their own economic and so-

cial condition, such claims that arise out of controversial military activities are inevitably tinged with political speech. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (soliciting for financial support "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues"). Veterans who, with the assistance of counsel, forcefully present such controversial claims compel the government to address the broader social implications of its military policies and also provide a point of focus for political debate over such policies. Legal advocacy that fosters broader social and political goals is a form of political expression that is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). The fee limitation impermissibly restricts this form of expression.

B. The Fee Limitation Restricts Veterans' Access to Information that Is Vital to Their Interests

One of the most important forms of information disseminated in our society is information concerning an individual's legal rights. The principal source of such information is the lawyer who is trained in the particular field of law that affects the individual's interests. This Court has recognized the critical need for access to legal information and has expressed its "concern that the aggrieved receive information regarding their legal rights and the means of effectuating them." *Bates v. State Bar*, 433 U.S. 350, 376 n.32 (1977). And the District of Columbia Circuit has recently held that "while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (citations omitted).

The fee limitation directly infringes upon a veteran's First Amendment right to obtain information from a lawyer regarding his rights before the VA because it pre-

cludes the veteran from hiring a lawyer to represent him before the agency. While this infringement is sufficiently serious in itself to warrant the invalidation of the fee limitation, VVA believes that it is critical to recognize that the fee limitation also inhibits a veteran's ability to obtain information about other facets of veterans law that may directly affect his legal rights.

The benefit programs administered by the VA under Title 38 of the United States Code represent only one facet of substantive federal law that governs the rights of veterans. Veterans' rights are also affected by provisions of federal law governing their ability to upgrade the character of their discharge from military service, *see* 10 U.S.C. §§ 1552-1553 (1982), and by statutes governing veterans' ability to obtain physical disability retirement compensation directly from the various military service departments. *See* 10 U.S.C. §§ 1201-1221 (1982). Other legal rights may accrue to veterans in particular circumstances. For example, a veteran who is injured as a result of the medical malpractice of the VA while being treated as a veteran may have a claim for disability benefits from the VA, but also can, in the alternative, bring suit against the VA under the Federal Tort Claims Act. 38 U.S.C. § 351 (1982).

Given the range of legal actions and remedies potentially available to veterans, one of the most critical questions a veteran will ever have to decide is which action or combination of actions should be pursued in order to best serve his interests in any given case. For example, the veteran may be in a position to choose between pursuing service-connected disability benefits from the VA or physical disability retirement compensation from his particular military service department,[27] but he cannot obtain benefits under both programs. 38 U.S.C. §§ 3104-3106. In order to make this decision, the veteran would have to consider a variety of factors including the extent of his disability, the permanency of his disability, his military pay level, the chances of prevailing and the availability of judicial review.[28]

[27] To obtain military department disability compensation after discharge, a veteran must apply to a Board for Correction of Military Records. *See, e.g., Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 932 (1963).

Given its complexity, the decision of how to proceed is clearly one that very few veterans would be wise to undertake without the advice of a lawyer. But the fee limitation substantially reduces the likelihood that most veterans would even consult a lawyer before making this and similar decisions involving overlapping areas of veterans law, because they would know that the lawyer could not represent them before the VA. If a lawyer were hired and advised the veteran to pursue the option of seeking benefits from the VA, the veteran would have to dispense with the services of his lawyer at the point that the VA claim was filed. The veteran would be deprived of the value of an ongoing attorney-client relationship and of the opportunity to follow up on his claim in the manner contemplated by his counsel.

The disincentives for open communication and exchange of information between veterans and lawyers in the area of veterans law have resulted in a pronounced shortfall in the number of members of the private bar with substantial expertise in veterans law.[29] In VVA's experience, members of the private bar have been inhibited from becoming specialists in veterans law because their contacts with veterans have been restricted by the fee limitation

[28] *See generally* Wellen, *Armed Forces Disability Benefits—A Lawyer's View*, 27 JAG J. 485 (1974).

[29] In *United States v. Brandon*, 584 F. Supp. 803, 807 (W.D.N.C. 1984), an action to collect overpayment of VA benefits from a veteran, the court stated that it was "not aware of any [overpayment] case in which the veteran has been represented by a lawyer," although the $10 fee limitation does not prohibit hiring counsel in such cases.

and because they realize that the fee limitation severely restricts the possibility of developing an economically viable practice. While lawyers are undoubtedly prejudiced by this situation, it is veterans themselves who are the ultimate losers. They are deprived of a marketplace for information and legal services that is available to virtually every other American who is able to retain counsel of his choice.

VVA believes that elimination of the fee restriction will facilitate communication between veterans and members of the private bar, thereby helping to ensure that veterans are adequately informed of their legal rights. As this Court has recognized, "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

CONCLUSION

For the foregoing reasons, VVA urges the Court to affirm the decision below.[30]

Respectfully submitted

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March 8, 1985

[30] This brief was prepared with the assistance of Michael P. Ettlinger of VVA Legal Services.

APPENDIX

APPENDIX

POSITION DESCRIPTION FOR ATTORNEY-ADVISER (GS-11) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 2, 1982

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Reviews and evaluates the evidence in claims folders and prepares tentative appellate decisions in written form for consideration of the Board Section. In connection therewith, applies the laws administered by the VA to the facts in the individual cases. Cases are assigned on a selective basis to progressively gain experience in the various kinds of appellate issues.

B. Conducts research on occasion on questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. As assigned, classifies appellate decisions for inclusion in BVA Index I-01-1 and prepares summaries of decisions designated as "select."

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the close supervision of the Chief Member, who is responsible for training and control of quality of tentative decisions. The incumbent may obtain the advice of Medical Advisers on medical problems and Senior Attorneys, where indicated, on legal problems arising in the preparation of tentative decisions. In general, however, he/she is expected to utilize initiative and judgment in evaluating the evidence and making findings of fact and conclusions of law in tentative decisions.

III. OTHER SIGNIFICANT FACTS

Must be a member of the bar, in good standing.

POSITION DESCRIPTION FOR ATTORNEY-ADVISER (GS-13) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 11, 1982

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Reviews and evaluates the evidence in claims folders. Applies the laws administered by the Veterans Administration to the facts in the individual case; then, prepares appellate decisions in written form for consideration of a Board Section. Very difficult cases, involving questions of law and mixed questions of law and fact, are selected for assignment to incumbent. Examples: Cases in which there are multiple questions at issue; new or novel questions for which there are no precedents; claims for entitlement to several benefits; claims for entitlement under a number of different provisions of law; cases involving highly conflicting evidentiary data which must be reconciled; contesting claims from several claimants for the same benefit; and cases vigorously argued by representatives.

B. Conducts research on original and novel questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. Gives advisory opinions orally or in writing on very difficult, complex and controversial problems encountered in appellate review.

D. When so requested by the Chief Member, attends hearings on appeals conducted before the Board in particularly involved cases, for the purpose of assisting the Section members in examining witnesses so as to assure that all relevant evidence is elicited.

E. As assigned, prepares correspondence on the more controversial appellate decisions and problems

for the Administrator's and the Chairman's signatures.

F. As assigned, classifies appellate decisions for inclusion in BVA Index I-01-1 and prepares summaries of decisions designated as "select."

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the general direction of the Chief Member. In general, is responsible for and is relied upon to prepare decisions in final form for the Board Section's review and consideration, and receives no technical supervision. Utilizes own initiative and judgment in evaluating the evidence, making findings of fact and conclusions of law. May confer with and seek advice on complicated medical or legal problems from medical advisers or Senior Attorneys.

III. OTHER SIGNIFICANT FACTS

Must be a member of the bar, in good standing.

POSITION DESCRIPTION FOR SENIOR ATTORNEY-ADVISER (GS-14) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, JUNE 10, 1983

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Prepares decisions on extremely complex and controversial appeals involving formal personal hearings held before members of the Board in Central Office and before Travel Sections of the Board in the field.

B. Attends formal personal hearings with the members.

C. Conducts pre-hearing meetings and discussions with Members of Congress, attorneys, appellants and service organization representatives to assure due process of law and to expedite the hearing process.

D. Prepares decisions requiring a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems submitted to the Board for final resolution. Obtains and evaluates expert opinions from the Chief Medical Director and independent medical experts associated with leading medical schools.

E. By direction of the Deputy Vice Chairman, formulates legal guidelines for use by other attorney-advisers to achieve uniformity throughout all Sections of the Appellate Group in the disposition of issues on appeal. Participates with medical advisers in the development of medico-legal guidelines.

F. Prepares decisions on cases before the Board through petition for reconsideration, where briefs or hearings to show error in a prior appellate decision have been presented and where the participating Board membership has been increased to six or more

in lieu of the usual three signatories for a de novo appellate decision.

G. Serves as Acting Board Member in the event of vacancy or in the absence of regular members, as designated by the Chairman or Vice Chairman of the Board.

H. Performs special professional assignments from the Chairman, Vice Chairman, Deputy Vice Chairman or Chief Member, to assist in the continued improvement of appellate services.

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the direction of the Chief Member of the Board Section, who assigns the duties enumerated above and exercises general administrative supervision.

III. OTHER SIGNIFICANT FACTS

A. Must have broad legal experience in the field of veterans' benefits, preferably with at least 2 years as an attorney-adviser for the appellate agency in the GS-13 level. Must have demonstrated exceptional ability to: timely prepare high quality decisions on extremely complex and controversial appeals involving unusual issues; authoritatively discuss legal and medical principles and evidentiary requirements with outside attorneys, physicians and appellants.

B. Must be a member of the bar, in good standing.